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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

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13 MIGUEL SEPULVEDA,

Case No. 12-cv-3008-W(BGS)

14 Plaintiff,

15 v.

16 UNITED STATES OF AMERICA,

17 **ORDER GRANTING**
18 **DEFENDANT'S MOTION TO**
19 **DISMISS CONSTITUTIONAL**
20 **CLAIMS [DOC. 5]**

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23
24 Defendant.

25 On December 19, 2012, Plaintiff Miguel Sepulveda commenced this action
26 against Defendant United States of America ("Government") for money damages under
27 the Federal Tort Claims Act ("FTCA"). The Government now moves to dismiss
Plaintiff's constitutional claims in the First Amended Complaint ("FAC") for lack of
jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Plaintiff opposes.

28 The Court decides the matter on the papers submitted and without oral
29 argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS** the
Government's motion to dismiss.

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1 I. BACKGROUND

2 On September 4, 2011, at approximately 8:45 p.m., Plaintiff attempted to enter
3 the United States from Mexico at the San Ysidro border checkpoint. (FAC ¶ 8.) At
4 the checkpoint, Plaintiff was directed to a secondary inspection and asked to provide
5 documents proving his United States citizenship. (Id.) He produced his California
6 driver's license, which the Border Patrol agent allegedly rebuffed in a "rude and
7 sarcastic" manner. (Id.)

8 The agent then instructed Plaintiff to exit his vehicle, and allegedly "proceeded
9 in an aggressive and agitated manner to order Plaintiff [] to place his arms behind his
10 back." (FAC ¶ 9.) Plaintiff alleges that ten Border Patrol agents then proceeded to
11 tackle him to the ground "with such force, his head slammed into the pavement and his
12 mouth and jaw hit the ground with such force his teeth were broken and his mouth was
13 bleeding." (Id.)

14 Plaintiff was then allegedly "forcefully thrown into a small cell and not given any
15 medical assistance" even though he "complained to Border Patrol agents he was in
16 severe pain and requested medical treatment due to his severe injuries." (FAC ¶ 9.)
17 After approximately one hour, Plaintiff alleges that he was "given rubbing alcohol to
18 apply to his injuries and photographs were taken by the Border Patrol agents." (Id.)

19 At 11:30 p.m., Plaintiff was released and he "immediately sought medical
20 treatment at Sharp Hospital in Chula Vista, California for a head, jaw and tooth
21 injury." (FAC ¶ 9.)

22 On December 19, 2012, Plaintiff commenced this action, asserting claims for: (1)
23 false imprisonment; (2) assault / battery; (3) negligence; and (4) intentional infliction
24 of emotional distress. Plaintiff also asserts constitutional claims for violation of his
25 Fourth Amendment rights under each claim except negligence, even though the
26 constitutional claims are not separately identified as independent claims. On June 11,
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1 2013, he amended his complaint, asserting the same claims.¹ The Government now
 2 moves to dismiss the constitutional claims and the requests for prejudgment interest
 3 and attorney's fees for lack of jurisdiction. Plaintiff opposes.

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5 II. LEGAL STANDARD

6 Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss
 7 based on the court's lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(b)(1).
 8 In such a motion, the plaintiff bears the burden of establishing the court's subject
 9 matter jurisdiction. "A federal court is presumed to lack jurisdiction in a particular case
 10 unless the contrary affirmatively appears." Stock West, Inc. v. Confederated Tribes,
 11 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). A Rule 12(b)(1) jurisdictional
 12 attack may be either facial or factual. White v. Lee, 227 F.3d 1214, 1242 (9th Cir.
 13 2000).

14 In a facial attack, the complaint is challenged as failing to establish federal
 15 jurisdiction, even assuming that all of the allegations are true and construing the
 16 complaint in light most favorable to the plaintiff. See Safe Air for Everyone v. Meyer,
 17 373 F.3d 1035, 1039 (9th Cir. 2004). Thus, a motion to dismiss for lack of subject
 18 matter jurisdiction will be granted if the complaint on its face fails to allege sufficient
 19 facts to establish jurisdiction. See Savage v. Glendale Union High Sch., 343 F.3d 1036,
 20 1039 n.2 (9th Cir. 2003).

21 "By contrast, in a factual attack, the challenger disputes the truth of the
 22 allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air
 23 for Everyone, 373 F.3d at 1039. "[T]he district court is not restricted to the face of the
 24 pleadings, but may review any evidence, such as affidavits and testimony, to resolve
 25 factual disputes concerning the existence of jurisdiction." McCarthy v. United States,

27 1 The Court notes that Plaintiff amended his complaint as a matter of course outside of the
 28 time frame permitted under Rule 15(a). Because the Government did not challenge the amendment,
 and because leave should be free given when justice requires, the Court will proceed with the FAC as
 the operative complaint. See Fed. R. Civ. P. 15(a).

1 850 F.2d 558, 560 (9th Cir. 1988). “Once the moving party has converted the motion
 2 to dismiss into a factual motion by presenting affidavits or other evidence properly
 3 brought before the court, the party opposing the motion must furnish affidavits or other
 4 evidence necessary to satisfy its burden of establishing subject matter jurisdiction.”
 5 Savage, 343 F.3d at 1039 n.2.

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7 III. DISCUSSION

8 “Sovereign immunity is jurisdictional in nature.” F.D.I.C. v. Meyer, 510 U.S.
 9 471, 475 (1994). The waiver of sovereign immunity is a prerequisite to federal-court
 10 jurisdiction. United States v. Mitchell, 463 U.S. 206, 212 (1983). “It is elementary
 11 that the United States, as sovereign, is immune from suit save as it consents to be sued,
 12 and the terms of its consent to be sued in any court define that court’s jurisdiction to
 13 entertain the suit. A waiver of sovereign immunity cannot be implied but must be
 14 unequivocally expressed.” Tobar v. United States, 639 F.3d 1191, 1195 (9th Cir. 2011)
 15 (citing United States v. Mitchell, 445 U.S. 535, 538 (1980)) (internal quotation marks
 16 omitted). “[L]imitations and conditions upon which the [United States] Government
 17 consent to be sued must be strictly observed and exceptions thereto are not to be
 18 implied.” Soriano v. United States, 352 U.S. 270, 276 (1957). Accordingly, “[a]bsent
 19 a waiver, sovereign immunity shields the Federal Government and its agencies from
 20 suit.” Mitchell, 445 U.S. at 538.

21 “The FTCA effects a limited waiver of sovereign immunity to allow certain
 22 common law torts claims to proceed against the United States.” Tritz v. U.S. Postal
 23 Serv., 721 F.3d 1133, 1140 (9th Cir. 2013) (citing Smith v. United States, 507 U.S.
 24 197, 201 (1993)); see 28 U.S.C. § 1346(b)(1). Specifically, the FTCA provides that
 25 federal courts exercise exclusive jurisdiction over

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1 claims against the United States, for money damages . . . for
 2 injury or loss of property, or personal injury or death caused
 3 by the negligent or wrongful act or omission of any employee
 4 of the Government while acting within the scope of his office
 5 or employment, under circumstances where the United
 6 States, if a private person, would be liable to the claimant in
 7 accordance with the law of the place where the act or
 8 omission occurred.

9 28 U.S.C. § 1346(b)(1). A claim is actionable under the FTCA only if the plaintiff
 10 satisfies all of the provisions under § 1346(b)(1). See Meyer, 510 U.S. at 477.

11 The Government argues in its facial challenge that the United States has not
 12 waived sovereign immunity for the constitutional claims asserted, the request for
 13 prejudgment interest, and the request for attorney's fees; and therefore, these claims
 14 and requests are not cognizable under the FTCA. (Def.'s Mot. 3:14–4:27.) Plaintiff
 15 curiously responds by arguing: (1) under Rule 8(a)(2), all that is required in a
 16 complaint is a "short and plain statement of the claim showing the pleader is entitled
 17 to relief"; (2) subject matter jurisdiction is conferred upon the federal courts for Fourth
 18 Amendment violations under 42 U.S.C. § 1983; and (3) an "exception to the
 19 exception" exists, allowing intentional-tort claims to proceed against the United States
 20 where "the perpetrator is a federal investigative or law enforcement officer." (Pls.'
 21 Opp'n 2:24–3:18.) However, these arguments fail to address the crux of the
 22 Government's motion.

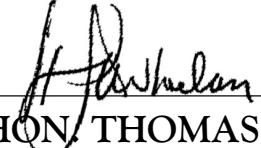
23 In the FAC, Plaintiff asserts Fourth Amendment violations under his claims for
 24 false imprisonment, assault and battery, and intentional infliction of emotional distress.
 25 (FAC ¶¶ 14, 19, 29.) He also requests prejudgment interest and "reasonable attorneys
 26 [sic] fees." (Prayer for Relief ¶¶ 3, 5.) These claims and requests do not satisfy the
 27 provisions proscribed in § 1346(b)(1) and, therefore, are not actionable. See 28 U.S.C.
 28 § 1346(b)(1); Meyer, 510 U.S. at 477. Plaintiff fails to present any remotely coherent
 argument that addresses whether he satisfies the requirements of the FTCA. In
 addition to failing to apply relevant law to the circumstances of this case, the arguments
 either are wholly irrelevant or rely on incorrect statements of the law. (See Pls' Opp'n
 2:24–3:18.)

1 IV. CONCLUSION & ORDER

2 In light of the foregoing, the Court **GRANTS** Defendant's motion to dismiss and
3 **DISMISSES WITH PREJUDICE** Plaintiff's constitutional claims and requests for
4 prejudgment interest and attorney's fees insofar as being brought under the FTCA. See
5 Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011)
6 ("[A] district court may dismiss without leave where . . . amendment would be futile.").

7 **IT IS SO ORDERED.**

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9 DATE: January 10, 2014


10 HON. THOMAS J. WHELAN
11 United States District Court
12 Southern District of California
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